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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS NIEBLA,

Defendant and Appellant.

D075037

(Super. Ct. No. SCD212938)

APPEAL from an order of the Superior Court of San Diego County, Lorna A. Alksne, Judge. Dismissed.

Johanna Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Donald W. Ostertag and Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

In 2006, defendant Luis Niebla shot and killed Porfirio Lopez after Lopez accused Niebla of burglarizing Luis Bello's home. Niebla entered into a plea bargain in which he

pleaded guilty to a lesser included offense of voluntary manslaughter with a firearm enhancement and other offenses. He received a determinate sentence of 26 years in prison. The judgment was reopened when the court resentenced Niebla in 2018, reducing his felony marijuana sales convictions to misdemeanors pursuant to Proposition 64. The trial court did not, at that time, consider an amendment to the firearm enhancement statute making a firearm enhancement discretionary instead of mandatory. Niebla contends this was error and seeks remand to the trial court to exercise its discretion to strike the firearm allegation and vacate 10 years of his stipulated sentence. We dismiss this appeal due to Niebla's failure to obtain a certificate of probable cause before challenging the validity of his plea.

BACKGROUND

*Facts*¹

In 2006, several items were stolen from Bello's home, including \$10,000 in cash and 27 pounds of marijuana. Lopez told Bello that Ramon Hernandez had called him and had asked him to help burglarize the home. Bello suspected that Niebla had helped Hernandez commit the crime so he and three friends went to confront Niebla and Hernandez. Niebla and Hernandez denied stealing from Bello. Bello and others convinced Lopez to confront Niebla and Hernandez with the accusations face-to-face.

¹ We include a brief statement of the facts concerning the murder only. That is the only offense with a firearm enhancement, which is the gravamen of Niebla's appeal. Niebla admitted that he committed the other charges alleged, except for conspiracy.

The men gathered at a dirt parking lot where an argument ensued and Niebla shot Lopez seven times. The men drove off, leaving Lopez to die.

Procedure

An amended information charged Niebla with murder with the allegation that he personally used a firearm during the murder (Pen. Code,² §§187, subd. (a) & former 12022.5, subd. (a), count 1); conspiracy to commit murder (§ 182, subd. (a)(1), count 2); false imprisonment by violence (§§ 236 & 237, subd. (a), count 3); transportation of more than an ounce of marijuana (former Health & Saf. Code, § 11360, subd. (a), count 4); possession of more than an ounce of marijuana for sale (former Health & Saf. Code, § 11359, count 5); burglary (§ 459, count 6); and two counts of making a criminal threat (§ 422, counts 7 & 8).

Niebla agreed to plead guilty to voluntary manslaughter (§ 192, subd. (a)), as a lesser included offense of murder, with personal use of a firearm, and six other felonies, in return for a stipulated sentence of 26 years and dismissal of the conspiracy charge.

In 2011, the trial court sentenced Niebla to the stipulated term of 26 years, comprised of the upper term of 11 years for voluntary manslaughter, with a consecutive upper term of 10 years for personal use of a firearm, and consecutive terms of one-third of the middle term on each of the remaining counts: eight months for false imprisonment; one year for transportation of marijuana; eight months for possession of

² Further statutory references are to the Penal Code unless otherwise specified. We refer to the 2006 versions of all code sections in connection with Niebla's crimes.

marijuana for sale; one year four months for first degree burglary; and eight months on each of two counts of making a criminal threat.

A petition for resentencing on the marijuana counts was granted on October 23, 2018, pursuant to Health and Safety Code section 11361.8. Proposition 64, voted into law on November 8, 2016, reduced most felony marijuana offenses to misdemeanors, including transportation and sale of more than an ounce of marijuana. (Health & Saf. Code, § 11361.8, subd. (b).) Niebla's sentence was recalled, his felony marijuana offenses were reduced to misdemeanors and Niebla was resentenced to one year, concurrent, on each of the two marijuana counts, with credit for time already served. The court resentenced Niebla on the remaining counts to the same terms originally ordered. Niebla's total sentence was reduced from 26 years to 24 years four months.

Niebla filed his notice of appeal on November 30, 2018. He did not request or obtain a certificate of probable cause.

DISCUSSION

The firearm enhancement statute was amended effective January 1, 2018, to give the trial court discretion to strike or dismiss the firearm enhancements in the interest of justice. (§ 12022.5, subd. (c).) The court had the authority to consider its new discretion to strike the enhancement when it resentenced Niebla on the marijuana convictions, but did not. (See *ibid.* [law applies to any resentencing]; *People v. Buycks* (2018) 5 Cal.5th 857, 893–894 [court may consider all components of sentence when it resentences defendant on any portion of sentence].)

Niebla asks that this case be remanded so that he can ask the trial court to exercise its newly authorized discretion to strike or dismiss the firearm enhancement from his stipulated sentence. The People contend that this appeal should be dismissed because Niebla failed to obtain a certificate of probable cause. We agree and dismiss this appeal.

A defendant must obtain a certificate of probable cause from the trial court before appealing a conviction from a guilty plea if the appeal challenges the validity of the plea. (§ 1237.5³; Cal. Rules of Court, rule 8.304(b)⁴; *People v. Mendez* (1999) 19 Cal.4th 1084, 1088 (*Mendez*.) A certificate of probable cause is not needed to challenge issues

³ Section 1237.5 provides, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

"(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

"(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

⁴ Cal. Rules of Court, rule 8.304(b) provides, in relevant part:

"(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal required by (a)—the statement required by . . . section 1237.5 for issuance of a certificate of probable cause.

" [¶] . . . [¶]

" [¶] . . . [¶]

"(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:

"(A) The denial of a motion to suppress evidence under . . . section 1538.5;
or

"(B) Grounds that arose after entry of the plea and do not affect the plea's validity.

"(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

that arose after the plea was entered and that do not challenge the plea's validity. (Cal. Rules of Court, rule 8.304(b)(4).) A challenge to a stipulated sentence that was agreed to as part of a negotiated deal "attacks an integral part of the plea [and] is, in substance, a challenge to the validity of the plea" that requires a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 73, 86.)

Recent cases have split on whether a certificate of probable cause is needed to challenge a stipulated sentence that has been affected by ameliorative legislative changes. Cases holding that a certificate of probable cause is needed include *People v. Williams* (2019) 37 Cal.App.5th 602, 606, review granted September 25, 2019, No. S257538; *People v. Galindo* (2019) 35 Cal.App.5th 658, 666, review granted August 28, 2019, No. S256568; *People v. Fox* (2019) 34 Cal.App.5th 1124, 1130, review granted July 31, 2019, No. S256298; and *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016, review granted June 12, 2019, S255145.

Cases that hold that a certificate is not needed include *People v. Ellis* (2019) 43 Cal.App.5th 925, 944 (*Ellis*), petition for review filed January 24, 2020; *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1074 (*Baldivia*); and *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 (*Hurlic*.) These courts concluded that the defendants did not require certificates of probable cause because they were not challenging the validity of their pleas. Instead, the defendants were seeking relief under a retroactive change in the law that could not have been foreseen, and plea agreements are deemed to contemplate and incorporate new changes in the law. (*Ellis*, at p. 945; *Baldivia*, at p. 1077; *Hurlic*, at

p. 57.) Ameliorative laws are applicable to all cases not final, so the purpose of the certificate of probable cause—weeding out vexatious and frivolous claims—was obviated. (*Ellis*, at p. 935; *Hurlic*, at pp. 57–58.) A certificate of probable cause should not be required for application of an unforeseen change in the law. (*Ellis*, at p. 935; *Hurlic*, at pp. 57–58.)

In *Ellis* and *Baldivia*, the notice of appeal was filed before the change in law and no certificate was required, and in *Hurlic* the new bill was signed only three weeks before the notice of appeal was filed. (*Ellis*, *supra*, 43 Cal.App.5th at pp. 928–929; *Baldivia*, *supra*, 28 Cal.App.5th at pp. 1073–1074; *Hurlic*, *supra*, 25 Cal.App.5th at p. 54.) The change in the law did not exist at the time of filing the notice of appeal. The defendants had no reason to request a certificate of probable cause to an issue that did not then exist.⁵

Here, however, the new law was effective well before the resentencing hearing and Niebla's filing of his notice of appeal. It was not unforeseen at the time of appeal. The Supreme Court has emphasized that the certificate rules must "be applied in a strict manner" and that a defendant must comply with the rules "fully, and, specifically, in a timely fashion." (*Mendez*, *supra*, 19 Cal.4th at p. 1099.) There was no basis for skipping the requirement of a certificate of probable cause here.

⁵ The Supreme Court is reviewing the necessity of a certificate of probable cause for a defendant to challenge a negotiated sentence based on a subsequent ameliorative, retroactive change in the law in the lead case of *People v. Stamps* (2019) 34 Cal.App.5th 117 (*Stamps*) review granted June 12, 2019, S255843, and other cases being held pending decision in that case.

DISPOSITION

The appeal is dismissed due to Niebla's failure to obtain a certificate of probable cause.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.